STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2004
v	No. 247842 Wayne Circuit Court
DAVID JOHN BURNS, Defendant-Appellant.	LC No. 02-003939-01

Before: Kelly, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit murder, MCL 750.83, and felonious assault, MCL 750.82. The trial court sentenced defendant to four to ten years in prison for the assault with intent to commit murder conviction, and one to four years in prison for the felonious assault conviction. We affirm.

Defendant first argues that the prosecution presented insufficient evidence that he intended to kill Lewis. "In reviewing whether there was sufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to decide whether any rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Knowles*, 256 Mich App 53, 57-58; 662 NW2d 824 (2003).

> The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. The intent to kill may be proved by inference from any facts in evidence. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. All conflicts in the evidence must be resolved in favor of the prosecution. [*People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999) (citations omitted).]

This Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that defendant assaulted the victim, Michael Lewis, with the intent to kill him. Lewis testified that defendant drove his vehicle into him and then exited the vehicle and attacked him. Lewis had defendant pinned against the vehicle at one point, but he let defendant go, only to be attacked again. Defendant struck Lewis causing him to fall to the ground, and attempted to gouge his eyes out. Lewis remembered seeing defendant with a knife, but did not remember being stabbed. Defendant himself testified that he stabbed defendant in the neck with a knife. After the attack, defendant stood up, declared that codefendant Rachael Joseph, the woman they had been fighting over, was not worth it, and drove away, leaving defendant bleeding on the ground. This circumstantial evidence was sufficient to allow a rational trier of fact to conclude that defendant intended to kill Lewis.

Defendant also argues that the prosecution failed to prove beyond a reasonable doubt that he was not acting in self-defense. But the prosecutor is not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility; it need only "introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide." *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995).

Defendant also argues that defense counsel was ineffective for failing to request a severance "where it was obvious that [defendant] would be unduly prejudiced by evidence of separate charges against [codefendants]." Because defendant did not preserve this issue by moving for a new trial or evidentiary hearing before the trial court, we review it on the basis of the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.* Because there was no evidentiary hearing, the trial court did not make any findings of fact on this issue. Thus, our review is strictly de novo.

"For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Id.*

On a defendant's motion, the court must sever related offenses "on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." MCR 6.121(C). According to MCR 6.120(B), offenses are related if they are based on "the same conduct" or "a series of connected acts or acts constituting part of a single scheme or plan."

The charges against defendant and codefendants Joseph and Robert Llanes were related as a series of connected acts. After beating and stabbing Lewis, defendant drove away. Lewis sought help from Joseph, but she too left him. Shortly thereafter, Joseph and Llanes returned and began to kick Lewis to persuade him to leave before the police showed up. These acts are connected to the crimes charged against defendant because they were temporally related and

committed to prevent the police from discovering defendant's assault on Lewis. Joseph's perjury was also connected to the assaults as an attempt to cover them up.

Considering the strong presumption in favor of joint trials, defendant has failed to demonstrate that a severance would have been "necessary" to avoid prejudice to defendant's substantial rights. Defendant asserts that the evidence of codefendants' and other witness' "bad acts" was irrelevant and prejudicial, but he fails to properly analyze this point. "A party may not merely state a position and leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). The complained of evidence may have been admissible even in a separate trial as res gestae of the charged offenses and to challenge the credibility of the witnesses. As such, defendant has failed to demonstrate to this Court that the trial court would have granted a motion for severance had defense counsel requested one. Accordingly, defendant has failed to show that defense counsel's failure to move for a severance fell below an objective standard of reasonableness.

Defendant finally argues that the trial court erred in permitting defendant's probation officer to testify about defendant's prior conviction for possession with intent to distribute marijuana. The probation officer also testified that he saw defendant within two weeks of the alleged incident and did not notice any physical injuries on his face. Based on our review of the record, it is clear that the trial court and the parties discussed whether the probation officer would be permitted to testify and the extent to which he would be permitted to testify. But there is no transcript of this discussion or any document filed that would enable us to determine (1) the trial court's exact ruling or (2) whether, or to what extent, defense counsel objected to admitting the evidence. Consequently, we are unable to review this issue because we cannot make necessary determinations such as whether defendant preserved the issue for appeal or waived the issue by agreeing to the admission the evidence for purposes of trial strategy. Therefore, we deem this issue waived.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Hilda R. Gage
/s/ Brian K. Zahra